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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DANIEL MATERA, as an individual, and on behalf of other persons similarly situated,

Plaintiff,

v.

GOOGLE, INC.,

Defendant.

Case No. 5:15-cv-04062 LHK

PLAINTIFF'S RESPONSE TO DEFENDANT'S SUPPLEMENTAL BRIEF REGARDING *SPOKEO, INC. V. ROBINS*

Date: June 27, 2016
Time: 1:30 p.m.
Courtroom: 8 - 4th Floor
280 S. First Street
San Jose, CA 95113
Judge: The Hon. Lucy H. Koh

ARGUMENT

Google fundamentally misstates the holding in *Spokeo Inc., v. Robins*, 136 S. Ct. 1540 (2016), incorrectly asserting that *Spokeo* requires Plaintiff to allege wrongful conduct "implicat[ing] 'a legally protected interest that is concrete and particularized' *independently* of the alleged statutory violations." (Def. Suppl. Br. at 1) (quoting in part *Spokeo*, 136 S. Ct. at 1543) (emphasis in original). Nowhere in the opinion does the Supreme Court state that an injury must be "independent" of a statutory violation. On the contrary, *Spokeo* makes plain that when the legislature enacts a statute to protect against an intangible harm, or when the injury at issue bears a "close relationship" to a right recognized by the common law, violations of that statute cause injuries sufficiently "concrete" to confer Article III standing. 136 S. Ct. at 1549.

Google attempts to recast its illegal and unauthorized interception, scanning, analyzing and cataloging of the content of Plaintiff's and Class Members' emails as being mere "automated processing." In fact, Google's intentional intrusion into Plaintiff's and Class Members' private communications, without their consent, is the *core* injury that ECPA and CIPA were enacted to prevent. This now-codified injury also bears more than a "close relationship" to historically-rooted common law guarantees of privacy in one's communications; indeed, courts recognized common-law causes of action for such privacy intrusions long before ECPA and CIPA were enacted. Thus, Plaintiff's injury is "concrete" and he has Article III standing.

I. In Enacting ECPA and CIPA, Congress and the California Legislature Specifically Sought to Prevent the Interception of Private Communications.

Spokeo resolves all doubt that statutory violations—without more—may form the basis of a concrete injury. *Id*. (Congress may "'elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.'") (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 578 (1992)). When, as here, a plaintiff has alleged the precise injury that Congress sought to remedy in enacting the statute at issue, a plaintiff "need not allege any *additional* harm beyond the one Congress has identified." *Id.* (emphasis original).

As discussed at greater length in Plaintiff's Supplemental Brief (Dkt. No. 41), the legislative intent behind ECPA was to provide electronic communications the same long-

recognized protections afforded to private letters and telephone calls. S. REP. NO. 99-541, 5, reprinted in 1986 U.S.C.C.A.N. 3555, 3559 (Oct. 17, 1986). Specifically, Congress sought to establish "a high level of protection *against unauthorized opening*" for "communications transmitted by new noncommon carrier communications services [and] new forms of telecommunications and computer technology." *Id*. (emphasis added). Similarly, CIPA was enacted to guard against "advances in science and technology [that] have led to the development of new devices and techniques for the purpose of eavesdropping upon private communications." Cal. Pen. Code § 630. The California legislature further clarified that "the invasion of privacy resulting from the continual and increasing use of such devices and techniques has created a serious threat to the free exercise of personal liberties and cannot be tolerated in a free and civilized society." *Id*.

Google argues that "Congress did not intend automated processing of emails to constitute a *per se* concrete injury." (Def. Suppl. Br. at 7). Plaintiff does not challenge "all automated processing of email"[1] but instead challenges a distinct act: Google's interception of private emails for purposes of acquiring the substance, meaning, or purport of those communications for its own commercial use. This act not only amounts to a violation of ECPA and CIPA, it also causes the *precise* harm that these statutes seek to prevent. Where a party such as Google takes advantage of cutting-edge technology to systematically intercept the emails of private citizens, for purposes of learning the content of those communications and without the authorization of the parties, a concrete injury is established. To accept Google's position that its alleged unauthorized interception and scanning of private email content is *not* a concrete injury under ECPA or CIPA, this Court would need to find that such privacy intrusions were not the harm that Congress or the California Legislature intended to protect against in enacting those statutes. But Google doesn't offer, and cannot offer, any alternative harm that ECPA or CIPA were meant to prevent. Because Google's acts in intercepting and analyzing Plaintiff's private emails amount to the very privacy

[1] By recasting Plaintiffs' allegations that Google scans, analyzes, and catalogs non-Gmail users' email content as a challenge to *all* "automated processing" of emails (including creating stored copies of emails for later retrieval by the sender or recipient, or spam filtering), Google appears to improperly re-litigate the "ordinary course of business" defense that has already been addressed in Google's Motion to Dismiss and Plaintiff's corresponding Opposition.

intrusion Congress and the California Legislature intended to prevent, Plaintiff alleges a concrete injury.

II. The Injury Remedied by ECPA and CIPA Bears a "Close Relationship" to Historically Recognized Torts.

Google's position that its interception and cataloging of private email communications bears "no 'relationship' to any 'harm that has traditionally been regarded as providing a basis for a lawsuit'" is equally flawed. *See* Def. Suppl. Br. at 7 (quoting in part *Spokeo*, 136 S. Ct. at 1549). In support, Google relies on this Court's analysis of a claim brought under the California Constitution by the plaintiffs in *In re Yahoo Mail Litig.*, 7 F. Supp. 3d 1016 (N.D. Cal. 2014). In doing so, Google again misconstrues *Spokeo*. To show that a statutory violation amounts to a concrete harm, a plaintiff need not show that all of the elements of a claim previously recognized in the common law are met. Instead, a plaintiff need only show that the harm the statute was meant to prevent "has a close relationship" to a harm recognized at common law. *Spokeo*, 136 S. Ct. at 1549. Although the elements of the claims may differ, it cannot be denied that there is a "close relationship" between the harm addressed in ECPA and CIPA—the interception of emails without consent—and the "legally protected privacy interest or reasonable expectation of privacy in any confidential and sensitive content within emails" recognized by the California Constitution. *Yahoo*, 7 F. Supp. 3d at 1040.[2]

Indeed, requiring ECPA or CIPA—or any statute conferring legal rights, for that matter—to contain the exact same elements of existing torts is entirely inconsistent with *Spokeo*'s holding that legislatures can "'elevat[e] to the status of legally cognizable injuries concrete, *de facto*

[2] The same is true for the harms recognized by common law torts protecting against third-party interception and reading of letters and emails. *See, e.g., Vernars v. Young*, 539 F.2d 966, 968-69 (3d Cir. 1976) (properly pled common law privacy claim premised on unauthorized opening of private letters); *Billings v. Atkinson*, 489 S.W.2d 858, 860 (Tex. 1973) (recognizing a common law right of privacy cause of action based on illegal wiretap of plaintiff's residence); *Fischer v. Mt. Olive Lutheran Church, Inc.*, 207 F. Supp. 2d 914, 927 (W.D. Wis. 2002) (denying summary judgment motion on statutorily-codified intrusion-upon-seclusion claim, premised on unauthorized access of personal email account); *Steinbach v. Vill. of Forest Park*, No. 06 C 4215, 2009 WL 2605283, at *4-5 (N.D. Ill. Aug. 25, 2009) (cognizable intrusion upon seclusion claim based on unauthorized reading and forwarding emails of plaintiff's emails). *See also Shulman v. Grp. W Prods., Inc.*, 18 Cal. 4th 200, 230-31 (1998) (recognizing "invasion of privacy" torts that make "unwarranted sensory intrusions such as eavesdropping, wiretapping, and visual or photographic spying" actionable because such intrusions are an "affront to individual dignity").

injuries that were previously inadequate in law.'" 136 S. Ct. at 1549. (quotation omitted). In Google's alternate universe, a legislature would be confined to enacting codifications of existing common law claims, with no variance in the elements of or how to prove such claims. This would render legislatures useless in making law.

III. Google's Authorities are Inapposite.

As addressed in greater detail in Plaintiff's Supplemental Brief, Google's authorities are inapposite. Those cases addressed either whether those plaintiffs had pled particular injuries, such as economic harm, required by the claims alleged, or whether those plaintiffs had met other Article III requirements not at issue here, such as the "actual and imminent" harm requirement.[3]

In fact, the cases upon which Google relies actually *support* Plaintiff's position that violations of statutes such as ECPA or CIPA, in and of themselves, amount to "concrete" harm. *See, e.g., In re Facebook Internet Tracking Litig.*, No. 5:12-md-02314-EJD, 2015 U.S. Dist. LEXIS 145142, at *37 (N.D. Cal. Oct. 23, 2015) (holding that, even without a showing of economic harm, "[p]laintiffs have established statutory standing for claims under the Wiretap Act, SCA and CIPA."); *Burton v. Time Warner Cable Inc.*, No. CV 12-06764 JGB (AJWx), 2013 U.S. Dist. LEXIS 94310, at *18-19 (C.D. Cal. Mar. 20, 2013) ("[T]he Article III requirement that the injury be 'concrete' can exist solely by virtue of statutes creating legal rights.") (citations

[3] *See, e.g., In re iPhone Application Litig.*, No. 11-md-2250-LHK, 2011 U.S. Dist. LEXIS 106865, at *17 (N.D. Cal. Sept. 20, 2011) (Koh, J.) (addressing a claim under the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 ("CFAA"), which requires a showing of economic loss); *In re Google Privacy Policy Litig.*, No. C 12-01382 PSG, 2012 U.S. Dist. LEXIS 183041, at *14-15 (N.D. Cal. Dec. 28, 2012) (same, regarding California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 ("UCL")); *LaCourt v. Specific Media, Inc.*, No. SACV 10-1256-GW (JCGx), 2011 U.S. Dist. LEXIS 50543, at *12 (C.D. Cal. Apr. 28, 2011) (same, regarding the UCL and the CFAA)); *Pirozzi v. Apple Inc.*, 913 F. Supp. 2d 840, 846-47 (N.D. Cal. 2012) (the plaintiff failed to allege a "particularized" or "actual or imminent" injury, in that she failed to allege which Apple devices she used and which tracked her information); *In re JetBlue Airways Corp. Privacy Litig.*, 379 F. Supp. 2d 299, 326-27 (E.D.N.Y. 2005) (not addressing Article III standing, but instead finding that actual injury is required to show trespass to an intangible property right arising under contract); *Low v. Linkedin Corp.*, No. 11-CV-01468-LHK, 2011 U.S. Dist. LEXIS 130840, at *9 (N.D. Cal. Nov. 11, 2011) (finding plaintiff's unique theories of harm, such as "emotional" harm, to be too abstract, conjectural, and hypothetical for the purposes of Article III standing). Google's reliance on *Murray v. Time Inc.*, No. C 12-00431 JSW, 2012 U.S. Dist. LEXIS 120150, at *17 (N.D. Cal. Aug. 24, 2012) is also misplaced, because the plaintiff there alleged only a mere procedural violation of California's "Shine the Light" law—that the defendant failed to provide him with its contact information—which had not necessarily resulted in the harm the statute was meant to protect against, because the plaintiff failed to allege that he would have requested from defendant the information he was entitled to under the law.

omitted). In sum, Google's authorities do not undermine, and in fact support, Plaintiff's position that Google's violations of ECPA and CIPA—through its intercepting, analyzing, and cataloging Plaintiff's private emails—constitute concrete harm.

CONCLUSION

Google's violations of ECPA and CIPA caused the core injuries that Congress and the California Legislature sought to remedy. These injuries have long been recognized in the common law as the types of intangible harms that create a cognizable legal claim. *Spokeo* thus makes clear that by pleading violations of these statutes, Plaintiff has Article III standing.

Dated: June 13, 2016

Respectfully Submitted,

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